Supreme Court, U.S.
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96 100 JUL 18 1996

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No. _____

In The

Supreme Court of the United States

October Term, 1995

SHELDON FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Petitioner,

v.

JON CATERINO; ROLAND HARMES, Director, Michigan Department of Natural Resources; and VERNICE DAVIS ANTHONY, Director, Michigan Department of Public Health,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED FOR REVIEW

Does the Equal Protection Clause of the 14th Amendment protect an individual from selective enforcement of state law where the state official is motivated by malice or bad faith, but there is no allegation that the selective enforcement was designed to punish the individual for the exercise of constitutional rights nor any allegation that a "suspect" classification is involved?

PARTIES BELOW

The following parties were named as defendants in the United States District Court for the Eastern District of Michigan but have no interest in the outcome of this petition and are not named as parties in the caption of this Petition: Sumpter Township; Helen Teall, Barbara Dudek, Arness Cox and Louis Banotai, Sumpter Township Trustees; Marvin Banotai, Township Supervisor; Paul Johnson, Deputy Supervisor and Township Administrator; Joan Oddy, Township Clerk; John Morgan, Township Treasurer; Michigan Department of Natural Resources; Michigan Department of Public Health; and Michigan Mobile Home Commission. Notice of noninterest has been served pursuant to Supreme Court Rule 12.6.

The other parties in the courts below are parties to this Petition and are identified in the caption.

Petitioner Sheldon Futernick, pursuant to Supreme Court Rule 29.6, certifies that there are no parent companies or nonwholly owned subsidiary companies to be listed.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported as *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996). A copy of the opinion is included in the Appendix at 1. The court of appeals' order denying Petitioner's petition for rehearing and suggestion for rehearing en banc is included in the Appendix at 35. A copy of the district court's opinion and order is included in the Appendix at 22. The district court's concurrent order of dismissal with prejudice and its subsequent order granting reconsideration and dismissing the action without prejudice as to Defendant Sumpter Township and its officials are included in the Appendix at 31 and 33.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on March 13, 1996. On April 25, 1996, the court of appeals denied Petitioner's timely-filed petition for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

CONCISE STATEMENT OF THE CASE

Introduction

This case presents a constitutional question of fundamental importance: Does the Equal Protection Clause of the 14th Amendment protect an individual from selective enforcement of state law where the state official is motivated by malice or bad faith – even though there is no allegation that the official is motivated by a desire to punish the individual for the exercise of constitutional rights, nor any allegation that a "suspect" classification, such as race or religion, is involved?

In the present case, the United States Court of Appeals for the Sixth Circuit ruled that the Equal Protection Clause affords no protection for selective enforcement, absent an allegation that the claimant was targeted because of his or her membership in a "protected" group or because of his or her exercise of a constitutional right. By so narrowing the breadth of the Equal Protection Clause, the Sixth Circuit's decision undermines the fundamental fairness that the Equal Protection Clause was designed to promote. Furthermore, the Sixth Circuit's decision conflicts with decisions of the First, Second, Seventh, Eighth and Tenth Circuits and fails to cite a single decision endorsing the narrow scope it assigns to the Equal Protection Clause. For these reasons, this Court should grant certiorari.

Factual Statement

Petitioner Sheldon Futernick, the plaintiff below, is the owner of two mobile home parks in Sumpter Township, Michigan. Effluents from the parks are discharged to groundwater and surface waters, pursuant to permits issued by the Michigan Department of Natural Resources ("MDNR").[1] (R. 1: Verified Complaint at ¶ 11). In March 1991, MDNR issued a new, stringent permit for one of the parks (Holiday Woods), which would have required substantial upgrades by September 1992, costing over $700,000; similar costly upgrades would be required at Mr. Futernick's other park (Holiday West). Such upgrades would be totally unnecessary if a sewer system, not yet constructed but contemplated by the Township, were constructed and brought to Mr. Futernick's parks. Connecting the parks to the sewers would save Mr. Futernick the substantial duplicative costs of constructing the upgrades and totally dismantling the wastewater treatment facilities, because the permits and the upgrades would no longer be legally required. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 29-31; Ex. 4: Burns Dep. at 16-17, 19-21). In July 1992, Sumpter Township promised Mr. Futernick that public sanitary sewer

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[1] Pursuant to a recent administrative restructuring, the functions of MDNR and the Michigan Department of Public Health ("MDPH") relevant to this case have been combined into a single entity, the Michigan Department of Environmental Quality. For purposes of clarity and consistency with the record, all references herein are made to MDNR and MDPH rather than to the new entity.

service would be provided to his parks, and Mr. Futernick agreed that the parks would pay "tap-in" fees connecting the parks to the sewer in advance of construction. Copies of the Township's written commitment to provide sewer were furnished to officials of MDNR and MDPH. (R. 37: Appendix to Motion Response, Exs. 5, 6).

Initially, in August 1992, the state enforcement official, Respondent Jon Caterino of MDPH, appeared to agree that Holiday Woods would not have to upgrade the facilities to meet the stringent new permit requirements pending connection to the Sumpter Township sewer that was yet to be constructed. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 41-43). MDNR also agreed that Holiday West's compliance with proposed new permit requirements would similarly be stayed pending connection to the sewer. (R. 37: Appendix to Motion Response, Ex. 3: Burns Dep. at 9-23).

However, on October 27, 1992 – after the deadline for completing the upgrades at Holiday Woods had already passed – Caterino falsely claimed to have no firm knowledge that the Township would provide sewer to Mr. Futernick's parks. At a meeting including Caterino and Township officials held in November 1992, Mr. Futernick's agent reminded Caterino of his prior agreement to hold compliance in abeyance. Caterino testified at deposition that Mr. Futernick's son and agent was excluded from a portion of the meeting, during which Caterino and the other participants discussed their dislike for him. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 61-62). Following another meeting between Caterino and Township officials in December 1992, Caterino and a representative of the MDNR threatened, with the Township's

knowledge, that if Mr. Futernick did not sign a contract with Sumpter Township by December 31, 1992 regarding sewer service, enforcement action would be initiated against both parks. (R. 37: Appendix to Motion Response, Ex. 1: Letter – Burns to I. Futernick). Mr. Futernick was prepared to sign a contract with the Township, based on the July 1992 agreements, but the Township never presented a contract, and no contract was signed.

Caterino then issued a certificate of noncompliance against Holiday Woods and recommended that an operating license for that park not be issued, thereby initiating enforcement proceedings against it; punitive action was also threatened against Holiday West. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 100-02; Ex. 25: Letter – Caterino to I. Futernick; Ex. 26: Letter – Caterino to S. Futernick). Under Michigan's enforcement scheme, issuance of a certification of noncompliance is the first step in putting a mobile home park operator out of business or in jail.

No similar or comparable deadlines, requirements, demands or threats were made by Caterino, MDNR or MDPH to any other area mobile home parks. Specifically, although Caterino demanded that Mr. Futernick present him with a signed contract from the Township evidencing that sewer would be provided to Mr. Futernick's parks, no such requirement was made of other area parks. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 145-48; Ex. 16: Johnson Dep. at 33-34; Ex. 21: Banotai Dep. at 91-92, 179-80). In fact, Caterino desisted from any adverse regulatory enforcement against another mobile home park based solely on his understanding that "there is some movement toward providing sanitary sewer in

the area . . . . " (R. 37: Appendix to Motion Response, Ex. 34: Letter – Caterino to Blank). As to another area park, no adverse regulatory enforcement was taken based solely on that park's oral representation that it was "currently attempting to obtain the extension of municipal sewer service" from the Township. (R. 37: Appendix to Motion Response, Ex. 68: Letter – Lauer to Dukes). Yet, as to Mr. Futernick's parks, Caterino demanded a signed contract with the Township by a date certain, even though Caterino had been furnished with the July 1992 letter agreements from the Township evidencing that sewer service would be provided.

Caterino's disparate treatment of Mr. Futernick was further evidenced by the fact that Caterino issued a certificate of noncompliance to Holiday Woods for the alleged failure to comply with a state wastewater discharge permit, yet Caterino failed to issue certificates of noncompliance to other area mobile home parks that were illegally discharging *without any permits whatsoever*. For example, one park has been illegally discharging for *over 20 years* – yet Caterino has taken no action against it. (R. 37: Appendix to Motion Response, Ex. 3: Caterino Dep. at 161-62, 181-82). Similarly, Caterino demanded that Mr. Futernick undertake costly hydrogeological studies (although such studies had been previously performed by Mr. Futernick), while he *completely excused* other parks from performing any hydrogeological studies. (R. 37: Appendix to Motion Response, Ex. 41: Letter – Caterino to Buchanan; Ex. 62: Letter – Caterino to Zollner).

Caterino's disparate treatment of Mr. Futernick's parks could not be explained by some theory that the other parks posed a less severe public health risk than

Mr. Futernick's parks. To the contrary: the public health risks posed by the other parks were fully documented. For example, one park discharged wastewater without a permit to unsealed lagoons in close proximity to drinking water wells. (R. 37: Appendix to Motion Response, Ex. 48: Letter – Grant to MDNR). Another park had a long history of discharging raw sewage onto the open ground. (R. 37: Appendix to Motion Response, Ex. 107: Letter – Caterino to Rakocy). By comparison, Mr. Futernick's alleged failure to meet the stricter permit requirements did not pose any such health risk.

This evidence of disparate treatment, coupled with the evidence of Caterino's personal animosity toward Mr. Futernick, raises the unmistakable inference – or, at a minimum, a triable issue of fact – that Caterino initiated enforcement action against Mr. Futernick maliciously and in bad faith.[2]

Procedural Background

As a consequence of the foregoing, Mr. Futernick filed suit in the United States District Court for the Eastern District of Michigan against Sumpter Township, the directors of MDNR and MDPH, Caterino and others, alleging, *inter alia*, violations of equal protection and seeking damages and an injunction under 42 U.S.C. § 1983. Federal jurisdiction was invoked under 28 U.S.C.

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[2] In compliance with Supreme Court Rule 14.1(g), which requires a concise statement of the case, Petitioner has summarized in briefest form the evidence of selective enforcement. A more detailed presentation of this evidence – encompassing some 26 pages – can be found in Petitioner's brief on appeal filed in the Court of Appeals on February 14, 1995, at 6-32.

§ 1331 because of the presence of a federal question. The claims against the Township were settled, pursuant to an agreement obligating the Township to connect Mr. Futernick's parks to its sewer.[3] The claims against Caterino were dismissed by the district court under Fed. R. Civ. P. 12(b)(6) for failure to state a claim and on qualified immunity grounds. The claims against the directors of MDNR and MDPH – which sought injunctive relief to prevent selective enforcement – were dismissed on Eleventh Amendment grounds.

On March 13, 1996, the Sixth Circuit affirmed the dismissal of all claims. It held that Mr. Futernick had failed to state a claim because he did not allege that Caterino's selective enforcement of environmental regulations against Mr. Futernick's parks was based on Mr. Futernick belonging to a "protected group" or motivated by a desire to punish him for the exercise of a constitutionally protected right. 78 F.3d at 1056-1060. It further held that Mr. Futernick's allegation that Caterino had been motivated by a malicious, bad faith personal animus did not suffice to state a claim for denial of the equal protection of the laws. *Id.* Mr. Futernick timely filed a

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[3] While the Township did connect one of Mr. Futernick's parks (Holiday West) to the sewer, it breached the settlement agreement by failing to connect another (Holiday Woods). Mr. Futernick has been forced to sue the Township for breach of the settlement agreement, which action is pending. The state administrative proceeding effected by Caterino's certificate of noncompliance as to Holiday Woods is pending as well.

petition for rehearing on March 26, 1996, which was denied on April 25, 1996.[4]

THE REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT HAS RENDERED A DECISION THAT CONFLICTS WITH THE DECISIONS OF COURTS OF APPEALS OF FIVE OTHER CIRCUITS ON AN ISSUE OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE, *i.e.*, WHETHER SELECTIVE ENFORCEMENT OF THE LAW VIOLATES THE EQUAL PROTECTION CLAUSE WHERE THE DISCRIMINATION IS THE PRODUCT OF MALICE OR BAD FAITH, BUT THERE IS NO ALLEGATION THAT IT WAS DESIGNED TO PUNISH AN INDIVIDUAL FOR THE EXERCISE OF CONSTITUTIONAL RIGHTS NOR THAT IT WAS BASED ON A "SUSPECT" CLASSIFICATION.

In this case, the Sixth Circuit held that an equal protection claim for selective enforcement of the law could be stated only where the selective enforcement was based on a suspect classification or was designed to punish an individual for exercising fundamental rights. According to the Sixth Circuit, however, malice or bad faith on the part of the enforcing official directed against the claimant is not sufficient by itself to trigger the Equal

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[4] The Sixth Circuit held that the district court's holding on the Eleventh Amendment issue was erroneous, but affirmed the dismissal of the claims against the directors of MDNR and MDPH nonetheless on the same grounds stated for its dismissal of the claims against Caterino. 78 F.3d at 1005. The Sixth Circuit did not address the qualified immunity issue.

Protection Clause. By so ruling, the Sixth Circuit placed itself in a minority of one, in conflict with the decisions of five other circuits.

The Seventh Circuit recently addressed this issue in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995) (Posner, C.J.). In *Esmail*, plaintiff alleged that he had been denied renewal of his liquor license, while the licenses of others were routinely renewed, solely because city officials had developed a "deep-seated animosity" toward him. *Id.* at 177-178. The court held that plaintiff had stated an equal protection claim – despite the absence of any contention that the deprivation was based on suspect classification or impinged on a fundamental right:

> If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

Id. at 179.

The Second Circuit decision in *FSK Drug Corp. v. Perales*, 960 F.2d 6 (2d Cir. 1992), is in accord with *Esmail*. FSK involved a registered pharmacy, which alleged that the New York State Department of Social Services had improperly denied its application for re-enrollment as a result of its selective enforcement of regulations against only large pharmacy and physician providers. The court recognized that there had been no allegation of discriminatory treatment based on a suspect classification or exercise of constitutional rights, but the court nonetheless "review[ed] the record for evidence of a malicious or bad faith intent to injure." *Id.* at 10. *Accord, LeClair v. Saunders*,

627 F.2d 606, 609-610 (2d Cir. 1980) (selective enforcement of regulations is violation of equal protection where "selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person").

The First Circuit has also agreed with the principle enunciated in *Esmail. Yerardi's Moody St. Restaurant v. Board of Selectmen*, 932 F.2d 89 (1st Cir. 1991). There, plaintiff brought a § 1983 claim, alleging that it had been improperly denied an extension of the closing time of its restaurant under its liquor license, unlike others similarly situated who were routinely granted an extension. There was no allegation of racial or religious discrimination, nor a claim that the plaintiff was being punished for the exercise of fundamental rights. Nonetheless, the court held that the plaintiff could overcome a motion for summary judgment if there were "evidence from which a jury reasonably could find that the Board acted with malicious or bad faith intent to injure Yerardi's." *Id.* at 92. *Accord, Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995) (allegations of selective enforcement of building code provisions stated equal protection claim, because "in the absence of invidious discrimination or the abuse of a fundamental right, a party may establish an equal protection violation with evidence of bad faith or malicious intent to injure").

The Tenth Circuit followed *Esmail*'s teaching in *Smith v. Eastern New Mexico Medical Center*, 72 F.3d 138, 1995 WL

749712 (10th Cir. December 19, 1995),[5] where a physician and nurse alleged violation of the Equal Protection Clause because of their employment termination, which they alleged was malicious, motivated by personal animosity and inconsistent with the disciplinary treatment accorded others similarly situated. In reversing the district court's granting of a motion to dismiss, the court of appeals emphasized:

> [T]he Equal Protection Clause protects not only against discrimination where victims within an identified classification or group are injured, but also where the plaintiff alleges "an element of intentional or purposeful discrimination" so as to invoke the clause to protect an individual victim.

1995 WL 749712 at 7. In reaching its decision, the Tenth Circuit relied on *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), a decision authored by Judge Learned Hand, where the court held that an architect's claim that he had been "singled . . . out for unlawful oppression" was sufficient to state an equal protection claim, although he was not a member of a "protected" group, nor did he claim to be the victim of retaliation for the exercise of his constitutional rights. 156 F.2d at 791-793.

In *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717 (8th Cir. 1996), where tenure-track assistant professors alleged that they had been disparately treated in the tenure review process, the Eighth Circuit concurred in the view that allegations of suspect classification or

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[5] A copy of the *Smith* decision, which is unpublished, has been lodged with the Clerk's office.

impingement of fundamental rights are not necessary to state an equal protection claim:

> Plaintiff need not prove that another fundamental right was trampled – the right to equal protection of the law is itself fundamental. Nor need plaintiff prove that he or she was victimized by a "suspect classification" such as race.

Id. at 721.

In fact, the Sixth Circuit *itself*, in a prior decision, had concurred in the view that a plaintiff alleging selective enforcement of the law *did* state an equal protection claim, notwithstanding the absence of suspect classification or impingement of fundamental rights, so long as plaintiff alleged that the state official acted out of malice or in bad faith. In *Wright v. MetroHealth Medical Center*, 58 F.3d 1130 (6th Cir. 1995), the court considered whether terminated public employees, who alleged selective enforcement of their employer's anti-nepotism policy, had stated an equal protection claim. The test set out by the court clearly included malice or bad faith as impermissible motives:

> "A claim of selective application of a facially lawful state regulation requires a showing that . . . the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992). *Because plaintiffs do not allege invidious discrimination because of an impermissible consideration or*

> *that MetroHealth acted in bad faith,* we conclude that the district court did not err in granting summary judgment to MetroHealth on this basis.

Id. at 1137 n.7 (emphasis added).

Despite this overwhelming authority, the Sixth Circuit in the present case held that allegations of malice or bad faith are *not* sufficient to state an equal protection claim. Feeling unconstrained by its prior decision in *Wright*, on the theory that it was dictum, 78 F.3d at 1057, n.10, the Sixth Circuit reasoned that the Equal Protection Clause only protects against arbitrary "classifications," and that proceeding against a particular individual out of malice would not be deemed a "classification." 78 F.3d at 1058.

In *Esmail*, Chief Judge Posner refuted this argument by noting that the smaller a class is – and there is none smaller than a class of one – the greater the need for judicial protection, the principal purpose of the Equal Protection Clause:

> [C]lassifications should be scrutinized more carefully the smaller and more vulnerable the class is. A class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause.
>
> Esmail's suit thus is not barred by the "class of one" rule, because there is no such rule.

53 F.3d at 180.

The Sixth Circuit's reliance on the notion of "classification" is further undercut by the fact that the court

itself recognized that the Equal Protection Clause protects a person who is victimized for the exercise of his constitutional rights. Such a person is a class of one – in precisely the same manner as is a claimant who is the victim of the personal animus of a governmental official. Thus, a claim based on malice or bad faith cannot be written out of the Equal Protection Clause based on the absence of a "classification."

The Sixth Circuit also purported to find a policy reason why the Equal Protection Clause should not be read broadly: the number of potentially meritless claims. 78 F.3d at 1058. But it cannot be sound constitutional jurisprudence to negate the existence of a right on the number of questionable lawsuits it might generate. Numerous constitutional provisions spawn meritless lawsuits. Nevertheless, the courts remain open for those with valid claims, even if the societal price is the filing of meritless ones.[6]

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[6] Although neither the district court's judgment of dismissal nor the court of appeals' judgment affirming the dismissal rested on a finding that Mr. Futernick's claims lacked merit as a matter of law, it is clear that the court of appeals believed that Caterino could "easily rebut" Mr. Futernick's claims. 78 F.3d at 1058, n.12. In fact, the court was mistaken. The court believed that Caterino could explain his failure to enforce against parks that were discharging without permits, because, according to the court, Caterino's jurisdiction is limited to enforcing the conditions of permits already issued by MDNR. *Id.* The court offered no citation of authority in support of this proposition. In fact, Caterino does have jurisdiction to enforce against parks that discharge without permits, because MDPH is authorized to conduct annual inspections and issue annual certificates of compliance based on standards issued by the department. Mich. Comp. Laws § 125.2317. *See also* Mich.

The Sixth Circuit also reasoned that selective enforcement directed against an *individual*, as opposed to a "protected group," was not proscribed by the Equal Protection Clause, because selective enforcement based on personal animosity is, for constitutional purposes, the same as random enforcement. 78 F.3d at 1059.

In *Esmail*, Chief Judge Posner refuted this analysis, demonstrating that: (a) the Equal Protection Clause protects persons – not just groups – against arbitrary action; and that (b) while truly random enforcement is constitutionally non-objectionable, selective enforcement is not random when it is the product of a constitutionally repugnant motive:

Admin. Code R. 325.3334 (MDPH regulation requiring compliance with state law regarding wastewater discharge and generally requiring mobile home parks with on-site sewage treatment facilities to obtain MDNR wastewater discharge permits); Mich. Comp. Laws § 324.3112(1) (state law prohibiting wastewater disposal without a state permit). Thus, Caterino clearly had the legal authority to enforce against parks that were discharging wastewater without permits. The Sixth Circuit also believed that Caterino could explain why he insisted on a written contract for the sewer between Mr. Futernick and the Township, but had no such requirement for other parks, on the grounds that only Mr. Futernick "refused to pay hook-up fees." 78 F.3d at 1058. However, Mr. Futernick did not refuse to pay "hook-up" fees; in fact, he agreed to pay such fees in advance of construction as part of the July 1992 commitment by the Township. (R. 37: Appendix to Motion Response: Ex. 111: Letter – I. Futernick to Johnson). In any case, whether the claim lacks *factual* merit is irrelevant to the entirely separate question of whether the Equal Protection Clause protects individuals from bad faith, selective enforcement of state law.

> It is true that the abuse charged in this case is remote from the primary concern of the framers of the equal protection clause. *Strauder v. West Virginia*, 100 U.S. 303, 306-07, 25 L.Ed. 664 (1879); *Palmer v. Thompson*, 403 U.S. 217, 220, 91 S.Ct. 1940, 1942, 29 L.Ed.2d 438 (1971). But neither in terms nor in interpretation is the clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives. *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 342 (7th Cir. 1991). In *Falls v. Town of Dyer*, 875 F.2d 146, 147 (7th Cir. 1989), we gave as an example "an ordinance saying: 'No one whose last name begins with "F" may use a portable sign in front of a 24-hour food shop, but everyone else may.' " Implicit in the example is the assumption that there is no nondisreputable reason for singling out persons whose last name begins with "F" for unfavorable treatment, since the mere fact of singling out does not present an issue of denial of equal protection.

53 F.3d at 180. Thus, truly random selective enforcement is not constitutionally objectionable, but selective enforcement that is the product of personal animus (or selective enforcement that cannot be explained by a nondisreputable reason) does violate the Equal Protection Clause.

Finally, the Sixth Circuit in the present case noted that federal court intervention is not necessary because state courts can be expected to protect citizens from governmental abuse. 78 F.3d at 1059. This reasoning overlooks the all-too-often accommodating attitude local

courts have towards local officials. As Chief Judge Posner explained in *Esmail*:

> Although the courts of Illinois seem to have been perfectly ready, willing, and able to protect Esmail against Mayor Macrane, powerful state or local officials are not infrequently able to overawe state or local courts.

53 F.3d at 180.

In sum, the Sixth Circuit's decision is fundamentally flawed, as a matter of law and policy, and even contradicts a prior decision of that court. The narrow scope the Sixth Circuit assigned to the Equal Protection Clause has been rejected by the First, Second, Seventh, Eighth and Tenth Circuits; and no court facing the question has endorsed the Sixth Circuit's limitation on the reach of the Equal Protection Clause. Certiorari should be granted to resolve the conflict between the circuits created by the Sixth Circuit's decision in this case and to decide a fundamental issue of constitutional law.

CONCLUSION

For the above reasons, Mr. Futernick respectfully requests that this Court grant a writ of certiorari, and, upon full review by this Court, the court of appeals' affirmance of the dismissal of Mr. Futernick's claims against Caterino and the directors of MDNR and MDPH should be reversed.

Respectfully submitted,

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Dated: July 17, 1996

Sheldon M. FUTERNICK, d/b/a Holiday West Mobile Home Park and d/b/a Holiday Woods Mobile Home Park, Plaintiff-Appellant,

v.

SUMPTER TOWNSHIP, Helen Teall, Barbara Dudek, Arness Cox and Louis Banotai, Sumpter Township Trustees; Marvin Banotai, Township Supervisor; Paul Johnson, Deputy Supervisor and Township Administrator; Joan Oddy, Township Clerk; John Morgan, Township Treasurer; Michigan Department of Natural Resources, Roland Harmes, Director; Michigan Department of Public Health, Vernice Davis Anthony, Director; Jon Caterino; and Michigan Mobile Home Commission, Defendants-Appellees.

No. 94-1902.

United States Court of Appeals,
Sixth Circuit.

Argued Feb. 6, 1996.

Decided March 13, 1996.

On Appeal from the United States District Court for the Eastern District of Michigan; Nancy G. Edmunds, Judge.

Mark A. Goldsmith (argued and briefed), Honigman, Miller, Schwartz & Cohn, Detroit, MI, for Sheldon Futernick.

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John C. Scherbarth, Asst. Attorney Gen. (argued and briefed), Office of the Attorney General, Natural Resources Div., Lansing, MI, for Michigan Dept. of Natural Resources, Michigan Mobile Home Com'n.

R. Phillip Brown (argued and briefed), Office of the Attorney General, Lansing, MI, for the Michigan Dept. of Public Health.

Before: MERRITT, Chief Judge, and CONTIE and BOGGS, Circuit Judges.

BOGGS, Circuit Judge.

Sheldon Futernick sued indiscriminately a host of state and local officials involved in regulating two mobile home parks that he owns and operates. He appeals from the district court's order dismissing all of his claims under Fed.R.Civ.P. 12(b)(6). Although we reverse the district court's erroneous decision regarding the Eleventh Amendment immunity of some of the named defendants, we affirm the district court's dismissal of all of Futernick's claims.

I

Sheldon Futernick owns and manages two mobile home parks in Sumpter Township, Holiday Woods and Holiday West. His parks discharge treated sewage effluent into surface water, pursuant to a permit issued by the

Michigan Department of Natural Resources (MDNR).[1] On March 20, 1991, MDNR amended the permit to require substantial modifications to Futernick's mobile home parks by February 1, 1993. ("This was the most stringent permit issued to any mobile home park in . . . the entire state of Michigan," complains Futernick in his brief to this court, estimating the cost of compliance to be over $700,000.) Futernick took little or no action in regard to the new permit requirements for at least a year.

In July 1992, Futernick had a series of meetings with Sumpter Township Supervisor Marvin Banotai to discuss a Township plan to construct a sewer system. The original plan included a sewer line running near Holiday West, but no line running near Holiday Woods. Futernick asked if a line could be extended to Holiday Woods, and Banotai agreed. Banotai sent confirming letters to Futernick announcing the plan to build a sewer accessible to both parks, and stating that the parks would be required to connect to the system.

Futernick then went to the state regulators and informed them that he planned to hook up to the Township sewer system – rendering unnecessary the costly improvements that his amended permit would require by February 1, 1993. Futernick's engineer, Seydou Diop, met with Barry Burns of the MDNR and Jon Caterino of the Michigan Department of Public Health (MDPH).[2] Diop

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[1] MDNR recently changed its name to the Department of Environmental Quality (DEQ), but we use the old name in this opinion.

[2] Although MDNR is responsible for issuing permits, MDPH is responsible for visiting sites and monitoring compliance. The local MDPH regulator is Jon Caterino.

summarized the results of the meeting in a letter to Burns and Caterino, dated August 19, 1992:

> Holiday Woods MPH [mobile park homes] will continue to operate as they are currently under the effluent limitations and monitoring requirements as set forth on page 2 of the current permit pending connection to the Sumpter Township sewer system.

Neither Burns nor Caterino voiced disagreement with this summary of their position immediately, and Futernick took no steps to upgrade his parks to meet the tougher effluent regulations.

On October 27, 1992, Caterino wrote Futernick, suggesting that the facility improvements would not be necessary if Futernick used the Township's sewer system, but also said that he had no "firm knowledge" that the Township planned to build such a system. He asked Futernick to begin the facility improvements necessary for compliance. Futernick responded by letter on November 4, stating that he interpreted Caterino's silence in light of the Diop letter to be an agreement to forestall regulation of Holiday Woods "until the Township brings the sewer to the Park and the Park has connected to the Township sewer."

Meanwhile, Futernick and the Township began to disagree on the terms of their earlier understanding. The Township says that Futernick promised to pay for the extension of the sewer line to Holiday Woods. Futernick denies that he promised to pay to connect either park to the new sewer line. The parties also disagree as to whether the Township obligated itself unconditionally to build the sewer line, or merely announced a potential

plan. Sometime in early November 1992, Futernick told Township engineers that he would not pay for the extension of the sewer line to either of his parks. In response, the engineers stopped work on the proposed extension.

Everyone involved – Caterino (MDPH), Burns (MDNR), the Township, some county officials, Futernick, and Diop – met on November 17 at the request of Caterino. Futernick and Diop were only allowed to attend part of the meeting. At this meeting, the Township refused (for the first time, says Futernick; again, says the Township) to build the sewer to Futernick's parks unless Futernick paid a hook-up fee. Caterino and Burns also refused to excuse Futernick from compliance with the new regulatory permit unless Futernick agreed to do what was necessary to hook up to the Township's sewers.

The parties' various positions became further entrenched at a second meeting (this time without Futernick or Diop) on December 1, 1992. At this meeting, the Township told the state regulators the amount of the hook-up fee they required, and Caterino and Burns decided that Futernick would have to sign a contract agreeing to pay this amount before he would be excused from his state regulatory obligations. Apparently, the Township was under significant time pressure because of a commitment to their sewage processing contractor. The Township and the state regulators set a deadline of December 31, 1992, for Futernick's financial commitment. Futernick received letters to this effect on December 4, 9, 10, and 14.

Futernick did nothing. On February 3, 1993, Caterino issued a Notice of Noncompliance concerning Futernick's

effluent discharge permit. On February 23, Caterino issued a Certificate of Noncompliance, which is the first step in a series of government actions that could eventually result in the closing of the mobile home park.

On March 9, 1993, Futernick filed his complaint in this action. He sued the Township and various Township officials, pursuant to 42 U.S.C. § 1983 and various state laws, to enjoin them from constructing a sewer system that did not include free hook-up status for Futernick. All claims against the Township were settled. Futernick agreed to pay $650,000 in hook-up fees ($400,000 for Holiday Woods and $250,000 for Holiday West), and the Township agreed to provide him with sewer service. The settlement was entered into the record of the proceedings. The district court dismissed the claims against the Township with prejudice. After Futernick moved for reconsideration, the district court amended its order so that the dismissal would be without prejudice.

Futernick also sued under § 1983 for injunctive relief against MDNR, MDPH, and Caterino, and for money damages against Caterino only, for violation of his right to equal protection of the law under the Fourteenth Amendment. On a Rule 12(b)(6) motion by the defense, the district court dismissed the claims against MDNR and MDPH on grounds of Eleventh Amendment immunity. The district court dismissed the claim for money damages against Caterino on grounds of qualified immunity. The court dismissed the claim for injunctive relief against Caterino because Caterino was merely enforcing a facially neutral state regulation and, therefore, the complaint failed to state a claim upon which relief could be granted.

Futernick filed a timely notice of appeal. He raises three issues that we now address. First, did the district court err by dismissing the claims against the Township because of the settlement? Second, did the court err by dismissing the claims against the directors of MDNR and MDPH on grounds of Eleventh Amendment immunity? Third, did the court err by dismissing the claims against Caterino because the complaint failed to state a claim upon which relief could be granted?

II

The district court dismissed the claims against the Township without prejudice. Futernick claims that this dismissal was an impermissible alteration of the parties' settlement agreement, contrary to *Brown v. County of Genesee*, 872 F.2d 169 (6th Cir.1989) (court not permitted to change terms of a settlement before enforcing it). Futernick claims that the terms of the settlement required the court to retain jurisdiction of the case until the Township built the sewer line and hooked up Futernick. *See Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir.1974) (holding that district court abused discretion to dismiss case with prejudice when dismissal with prejudice was contrary to parties' settlement agreement), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975).

Futernick's argument fails because the settlement agreement says that the case will be stayed "with the court's permission."[3] Futernick argues that, despite this

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[3] The oral settlement agreement was read into the record of the proceedings below. The relevant portion of the agreement is set out at Appellant's Brief 4-6.

language, the court's acceptance of the settlement agreement *implied* that a stay would be granted. We do not believe that mere acceptance of a settlement agreement overcomes its express language – and therefore we will not conclude that the court's decision to dismiss is a "violation" of an agreement in which the court made no promise to the parties. Furthermore, the dismissal of the case without prejudice does not leave Futernick without an adequate remedy if promises made in the settlement agreement are not kept by the Township. At oral argument, counsel for Futernick admitted that an action for breach of contract has been filed in Michigan state court. Additionally, because the dismissal was without prejudice, Futernick remains free to renew his action in federal court.[4]

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[4] Futernick may not be able to seek contempt sanctions against the Township immediately, as he would have been able to had the district court retained jurisdiction or incorporated the settlement agreement into the order of dismissal. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. ___, ___, 114 S.Ct. 1673, 1677, 128 L.Ed.2d 391 (1994), held that a federal court does not have jurisdiction to enforce a settlement agreement reached in a dismissed action unless that settlement agreement was incorporated into the order of dismissal. But Futernick remains able, because the dismissal was without prejudice, to bring another § 1983 action in the same district court, if he can state a cognizable constitutional claim. Absent a showing as to why the threat of contempt sanctions is immediately needed, there is no reason for us to conclude that the combined effect of these state and federal remedies is inadequate for Futernick's purposes.

III

Futernick's next allegation of error is essentially correct. The district court should not have dismissed the claims for injunctive relief against the directors of MDNR and MDPH on grounds of Eleventh Amendment immunity. Eleventh Amendment immunity does not bar injunctive relief against state officials for violations of federal law. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Thomson v. Harmony*, 65 F.3d 1314, 1320 (6th Cir.1995).

The district court held that Young did not apply because Futernick sued the directors in their official capacity, and sought relief from the department, rather than the directors themselves. That holding appears to be a confused extension of the rule that the Eleventh Amendment bars a suit against a state officer if that suit would lead to monetary relief against the state treasury (by some means other than indemnification). The court's confusion probably stems from *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1983):

> The Eleventh Amendment bars a suit against state officials when the state is the 'real, substantial party in interest.' . . . regardless of whether [the plaintiff] seeks damages or injunctive relief.

Id. at 101-02, 104 S.Ct. at 908-09. It is error to read the language about the "party in interest" as an extension of Eleventh Amendment immunity to actions seeking injunctive relief against a state officer who is violating federal law. *Thomson*, 65 F.3d at 1320. To the extent the

text of *Pennhurst* supports such a reading, it is overruled by *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). *Will* reaffirmed that state officers who are violating a federal law may *always* be sued for purely injunctive relief – "capacity" and "party in interest" are irrelevant. *Id.* at 71 n. 10, 109 S.Ct. at 2312 n. 10.[5]

Although the state agency defendants are not entitled to Eleventh Amendment immunity, we still affirm the dismissal of the case against these defendants. Futernick alleges (only) that these defendants violated his equal protection rights by selectively enforcing facially valid state environmental regulations. We affirm the dismissal of this case against these defendants for the same reason that we affirm the dismissal of the case against Jon Caterino in his personal capacity, as discussed immediately below: Futernick fails to state a claim upon which relief can be granted.

IV

The heart of Futernick's case is the claim that state officials, especially Jon Caterino of MDNR, violated his

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[5] The directors also argue that only the officer with immediate control over the challenged act or omission is amenable to § 1983. We find this claim ridiculous. Such a rule would allow a state agency to avoid, or defer, liability merely by transferring the defendant in a particular case, or by changing the scope of the defendant official's authority. The directors of a state agency, no matter how far removed from the actions of agency employees, are proper parties to a suit for an *injunction* under § 1983.

constitutional right to equal protection of the law by selectively enforcing Michigan state environmental regulations. The district court dismissed the claim for injunctive relief against Caterino for failure to state a claim.[6] We review *de novo* to determine whether the complaint alleges "the material elements to sustain a recovery under some viable legal theory." *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir.1993) (citation omitted).

There is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere; and prosecutors have broad discretion in deciding whom to prosecute. *Cf. Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985) (government's choice to prosecute only those draft violators who inform government of their intention not to register is not a violation of equal protection).

Sometimes the enforcement of an otherwise valid law can be a *means* of violating constitutional rights by invidious discrimination. To address this problem, courts

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[6] The court dismissed the money damages claim against Caterino on grounds of qualified immunity. Since a holding that Futernick failed to state a claim for constitutional relief under Rule 12(b)(6) necessarily includes a holding that Futernick cannot show that Caterino violated a constitutional right of which any reasonable official in his situation would have been aware, it seems prudent to address the 12(b)(6) dismissal first.

have developed the doctrine of selective enforcement. Usually, a claim of selective enforcement arises as a defense in a criminal prosecution or regulatory enforcement action. In this context, the court should dismiss a case, or take other appropriate action, if the defendant can prove that the prosecutor or investigator intentionally "singled him out" for punishment because of membership in a protected group or the exercise of a constitutionally protected right. *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir.1991) (criminal prosecution); *Schehl v. Comm'r of Internal Revenue Serv.*, 855 F.2d 364, 367 (6th Cir.1988) (civil action for penalties).[7]

Selective enforcement can also lead to § 1983 liability if the plaintiff pleads "purposeful discrimination"

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[7] We have differentiated the two types of selective prosecution claims. True "selective prosecution" requires the plaintiff to show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation not members of the protected group would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent. *Anderson*, 923 F.2d at 453. "Vindictive prosecution" is prosecution to deter or punish the exercise of a constitutionally protected right. The plaintiff must show: (1) exercise of a protected right; (2) the prosecutor's "stake" in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the plaintiff for exercise of the protected right. *Ibid. See also United States v. Hazel*, 696 F.2d 473 (6th Cir.1983) (holding that prosecution of particularly notorious tax evaders is not a violation of equal protection because prosecution was motivated by notoriety of offenders, not the offender's actual speech); *United States v. Andrews*, 633 F.2d 449, 457 (6th Cir.1980) (Merritt, J., dissenting, discussing requirements for a valid vindictive prosecution claim).

intended to accomplish some forbidden aim. *Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 359-60 (6th Cir.1983) (affirming trial court's finding that state officials did not *intentionally* discriminate against abortion clinics when enforcing surgical clinic licensing regime); *Wright v. MetroHealth Medical Ctr.*, 58 F.3d 1130, 1137 n. 7 (6th Cir.1995) (dismissing plaintiff's claim that hospital selectively enforced employment policy because plaintiff did not allege any impermissible intent). *See generally Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962) ("the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" if "the selection was [not] deliberately based upon an unjustifiable standard").

This circuit has not squarely addressed the question of what aims are forbidden ones for the purposes of a selective enforcement action under § 1983. It seems clear to us that intentional selective enforcement because of race, nationality, religion, or gender is grounds for § 1983 relief. *Oyler* itself says "race, religion, or other arbitrary classification." 368 U.S. at 456, 82 S.Ct. at 506. The term "arbitrary classification" implies that certain other group distinctions could be a basis for liability – such as the alleged focus on abortion clinics in *Birth Control Centers*, 743 F.2d at 359. Protecting certain other groups from selective enforcement may fit the slightly heightened "rational basis scrutiny" given to suspicious classifications by equal protection jurisprudence generally. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (striking requirement that home for the mentally retarded obtain a special use permit); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72

L.Ed.2d 786 (1982) (striking Texas law excluding immigrants from free public education).[8]

It is also clear that selective enforcement intended to discourage or punish the exercise of a constitutional right, especially the right to criticize the government, is sufficient basis for § 1983 relief. The availability of § 1983 relief for what we have called "vindictive enforcement," *Anderson*, 923 F.2d at 453, seems a necessary corollary to the defense recognized in free speech cases like *Wayte*, 470 U.S. at 608-10, 105 S.Ct. at 1531-32, and *Hazel*, 696 F.2d at 473. Of course, as the eventual failure of the plaintiffs' claims in *Wayte* and *Hazel* indicates, the plaintiff must prove intent to punish for the act of speech, rather than intent to concentrate limited resources on the most notorious or easy to locate violators.

Futernick, however, does not claim to be a member of any group, nor does he claim that Caterino is punishing him for exercising a constitutional right. Instead, he claims that relief under § 1983 is available because Caterino selectively enforced the law "maliciously" and in "bad faith."[9] This circuit has not yet decided if an

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[8] On the other hand, every "arbitrary classification" cannot be a basis for liability. Mere arbitrariness – prosecuting everyone whose first name begins with the letter A, for example – does not indicate any constitutionally impermissible intent. *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir.1987). In fact, random choice may be one of the *most* sensible methods to allocate "equally" finite enforcement resources.

[9] The complaint alleges "purposeful discrimination aimed specifically" at Futernick, without any allegation of impermissible intent. Complaint at 15. In his arguments below and in briefs to this court, Futernick expounds on the otherwise

allegation of malice is sufficient to state a claim of selective enforcement. Futernick argues that we have, citing *United States v. Bustamante*, 805 F.2d 201, 202 (6th Cir.1986), where we stated that a plaintiff must show "bad faith." Futernick neglects to mention that *Bustamante* defined "bad faith" as "based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights." *Ibid.* The question remains open whether malice or personal animosity is a constitutionally impermissible consideration.[10]

The First and Second Circuits have stated that they will allow § 1983 relief against a state official who selectively enforces a law or regulation out of malice, but without the intent to injure a group or punish the exercise of a constitutional right. *E.g., LeClair v. Saunders*, 627 F.2d 606, 610 (2nd Cir.1980) (Sec. 1983 action can be based on group membership, the exercise of fundamental rights, *or* "malicious or bad faith intent to injure a person"). To our knowledge, however, neither court, despite the citation of general language indicating the possibility of a successful action, has ever affirmed a victory for the plaintiff on such a theory. *See Yerardi's Moody Street Restaurant & Lounge v. Board of Selectmen*, 932 F.2d 89, 92-94 (1st

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insufficient allegation in his complaint. He alleges "malice" and "bad faith," and supplies two possible motives for Caterino's actions: first, that Caterino personally dislikes Futernick; and second, that Caterino is conspiring with the Township to allow the Township to charge Futernick an exorbitant sewer hook-up fee.

[10] We also suggested that such a claim would be possible in dicta in a footnote in *Wright*, 58 F.3d at 1137 n. 7.

Cir.1991) (defendant city board entitled to directed verdict because evidence of malice was insufficient); *Yerardi's Moody Street Restaurant & Lounge v. Board of Selectmen*, 878 F.2d 16, 20-21 (1st Cir.1989) (individual defendants entitled to qualified immunity); *Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir.1995) (affirming grant of summary judgment because evidence of malice is insufficient); *LeClair*, 627 F.2d at 606 (reversing judgment for plaintiff at trial because evidence of malice is insufficient); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir.1992) (affirming grant of summary judgment because evidence of malice insufficient). *See also Rubinovitz*, 60 F.3d at 911-12 (successful claims for malicious prosecution in violation of the equal protection clause should be "infrequent"); *Cornett v. Sheldon*, 894 F.Supp. 715, 723 (S.D.N.Y.1995) (dismissing claims for selective prosecution because conclusory allegation of malice in complaint not supported by the allegation of specific facts).

We cited the Second Circuit's statement in *FSK Drug* in dicta in *Wright v. MetroHealth Medical Center*, 58 F.3d 1130, 1137 n. 7 (6th Cir.1995). In *Wright*, however, the issue of selective enforcement was not addressed because the plaintiff did not raise it below, and because the plaintiff made *no* allegation as to the defendant's intent. Now that we are presented with the facts of an actual case, we believe that it would be unwise to adopt the often-stated, but never-used, rule of the First and Second Circuits.[11]

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[11] Other circuits that have stated the prima facie case for a claim of selective enforcement have not mentioned malice or intent to injure an individual on the part of the prosecutor or regulator. *E.g., Government of the Virgin Islands v. Harrigan*, 791

The Supreme Court in *Oyler* mentions only arbitrary *classifications* as a basis for selective enforcement liability. 368 U.S. at 456, 82 S.Ct. at 506. *Accord Wayte*, 470 U.S. at 608 n. 10, 105 S.Ct. at 1531 n. 10 (citing *Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) and *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). We do not believe that choosing to enforce the law against a particular individual is a "classification" as that term is normally understood. *Webster's Third New International Dictionary* 417 (1986) (defining "classify" as "to group or segregate in classes that have systematic relations usually founded on common properties or characters; sort").

Furthermore, we see compelling reasons that the sundry motivations of local regulators should *not* be policed by the Equal Protection Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right. The sheer number of possible cases is discouraging. Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited.

F.2d 34, 36 (3d Cir.1986) (forbidden aims include intent to injure a group and intent to punish exercise of fundamental rights); *Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052, 1058 (5th Cir.1985) (same); *E & T Realty v. Strickland*, 830 F.2d 1107, 1114 (11th Cir.1987) (Sec. 1983 plaintiff must show intent to injure group).

Recognizing this dilemma, the First Circuit limits the availability of § 1983 for a regulator's malice by requiring that the plaintiff prove that others who are similarly situated in "all relevant aspects" have not been regulated. *Rubinovitz*, 60 F.3d at 910 (citing *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir.1989)). Strict adherence to this initial requirement allows only cases of *extraordinary* selectivity to state a claim. However, we are uncertain if a focus on similarly situated persons works as a screening device. Determining "all relevant aspects" of similar situations usually depends on too many facts (and too much discovery) to allow dismissal on a Rule 12(b)(6) motion. If we require defendants to wait until summary judgment, we burden local and state officials with the regular prospect of "fishing expeditions" and meritless suits.[12] In the meantime we federalize and

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[12] Futernick's claim is typical. After apparently mammoth discovery from the Township and the state, Futernick has accumulated evidence that other mobile home parks in the area discharged sewage into the ground water without a permit. The record also contains evidence that other mobile home parks in the area were excused from sewage regulations on vague promises that they would hook up to the local sewer system.

The state defendants can easily rebut this evidence and show that Futernick is not "similarly situated" – essentially a demonstration that there is some rational reason why prosecuting only Futernick makes sense. As to the discharge of effluent without a permit by other mobile home parks, Caterino cannot regulate these parks because his jurisdiction is limited to enforcing the conditions of permits already issued by MDNR. As to Caterino's decision to excuse other mobile home parks on the vague promise of hook-up to local sewer systems, none of the other mobile homes have expressly refused to pay hook-up fees as has Futernick. Eventually winning these points,

constitutionalize what are essentially issues of local law and policy.

The nature of the right to equal protection also counsels against expanding a federal right to protection from non-group animosity on the part of local officials. It is clearly not a violation of equal protection if a local regulator, faced with limited resources, picks people to regulate in a perfectly random manner. *Supra* n. 8. Similarly, the presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution. From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as *random* as the roll of a dice. There is no constitutionally significant category of people that have a greater or lesser chance of being affected by it. The Constitution's protection begins only when the *incidence* of the burden of regulation becomes constitutionally suspicious.

We certainly do not sanction the abuse of state or local regulatory power. Regulation out of personal dislike or vendetta is repugnant to the American tradition of the rule of law. However, the states themselves are vibrant defenders of this tradition. *Cf. Alfaro Motors, Inc. v. Ward,* 814 F.2d 883, 888 (2d Cir.1987). ("Section 1983 is not a means for litigating in a federal forum whether a state or local administrative decision was arbitrary and capricious.") Those affected by the unfair regulator have recourse to the state political processes that appointed

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however, does not relieve the Township – or any future defendant – of the burden of producing the documents and litigating the suit up to the point of dismissal.

that regulator in the first place. State courts or the state constitution may provide protection. Additionally, in extreme cases, the defendant in a regulatory action may have federal due process claims, reviewable by the Supreme Court of the United States by writ of certiorari. *Cf. Sun Valley Foods v. Ficano,* 801 F.2d 186, 189 (6th Cir.1986) (defendant in enforcement action cannot retry case in federal court simply by invoking § 1983; federal courts have no jurisdiction to hear cases proceeding in state court or decided by state courts, and state court defendant's only recourse is possible Supreme Court review). Absent a breakdown in the state's normal political process that unfairly affects a protected group or the exercise of constitutional rights, we can and should trust states to police adequately their own processes.

Our discussion suggests that there is a difference between the general doctrine of equal protection – relevant when the plaintiff is challenging a classification made by state law – and the doctrine of selective enforcement. When the plaintiff challenges a classification made by state law, the state must show that the classification is rationally related to a legitimate state purpose, regardless of the nature of the classification or the persons it affects. *See, e.g., McLaughlin v. Florida,* 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964) ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.").[13] In selective enforcement doctrine, however, the

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[13] That requirement is often criticized because courts change the potency of rational basis scrutiny according to the outcome that will result from its application, *see generally,*

characteristics used to select some people to prosecute or regulate need not be rationally related to a state need. The difference is due to the discretion to initiate government action traditionally given state officials. It is also due to the legitimate and practical necessity for a state somehow to choose to prosecute or regulate only part of the group of people who may be violating the law, and to do so without subjecting the selection decision to micromanagement by courts.

For these reasons, we hold that the choice of whom to prosecute or cite for a violation of an otherwise valid law or regulation is constitutionally troublesome only when it is blemished by the intent to harm a protected group or punish a person for the exercise of a constitutionally protected right. Because Futernick does not allege either of these forbidden aims, his § 1983 action fails to state a claim upon which relief can be granted.

V

Although the district court erred by holding that the directors of MDNR and MDPH were entitled to sovereign immunity, we AFFIRM the dismissal of the entire action.

Laurence H. Tribe, *American Constitutional Law* 1443-50 (2d ed. 1988) (courts "covertly" heighten scrutiny as classifications become more suspect, and lower scrutiny as classifications become more mundane), but it remains the general method of equal protection analysis.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Plaintiff, Case No. 93-71013

v. Hon. Nancy G. Edmunds

SUMPTER TOWNSHIP; HELEN TEALL, BARBARA DUDEK, ARNESS COX and LOUIS BANOTAI, Sumpter Township Trustees; MARVIN BANOTAI, Township Supervisor; PAUL JOHNSON, Deputy Supervisor and Township Administrator; JOAN ODDY, Township Clerk; JOHN MORGAN, Township Treasurer; MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMES, Director; MICHIGAN DEPARTMENT OF PUBLIC HEALTH, VERNICE DAVIS ANTHONY, Director; JOHN CATERINO and MICHIGAN MOBILE HOME COMMISSION,

Defendants.

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ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

This matter came before the court on Defendants' motions to dismiss. On March 31, 1993, defendants Michigan Department of Public Health ("MDPH"), Vernice Davis Anthony, and Jon Caterino filed a motion to dismiss. On April 5, 1993, defendants Michigan Department of Natural Resources ("MDNR"), Roland Harmes, and

Michigan Mobile Home Commission ("MMHC") filed a motion to dismiss. Plaintiff filed a response to both motions on April 13, 1993. Defendants filed one reply on April 26, 1993. Oral argument was heard April 28, 1993. After being advised by the parties that a settlement could be reached, the court conducted seven settlement conferences between May 5, 1993, and February 1, 1994. Although the parties failed to reach a settlement with regard to claims against the state defendants, they did reach a resolution with regard to claims against the township defendants. At the February 1, 1994 settlement conference, the court granted Plaintiff's request to file a supplemental response to the two pending motions to dismiss. Plaintiff filed his supplemental brief March 1, 1994; and Defendants filed a supplemental brief March 15, 1994. For the reasons that follow, the court will grant Defendants' motions.

I. Facts

Plaintiff Sheldon Futernick owns two mobile home parks, Holiday Woods and Holiday West, in Sumpter Township. Both parks use on-site wastewater treatment systems, and both parks had been required to renovate those systems. The need for renovations would be eliminated, however, if municipal sewer service were available. The instant suit was filed after Sumpter Township Board of Trustees adopted a sewer route which included neither of Plaintiff's parks. Under the route adopted by the township board on February 9, 1993, no mobile home park had direct access to the sewer system; however, any park could connect to the system by constructing a lateral line.

II. Standard of Review

In considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, this court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993). The complaint must include direct or indirect allegations " 'respecting all the material elements to sustain a recovery under *some* viable legal theory.' " *Id.* (citations omitted) (emphasis in original).

IV. Applicable Law

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI. The Eleventh Amendment has been interpreted by the United States Supreme Court to bar suits against a state by its own citizens. *Edelman v. Jordan*, 415 U.S. 651 (1974). In *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1983), the Court stated, "It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Id.* at 100-101. The Court added, "This jurisdictional bar applies regardless of the nature of the relief sought." *Id.* at 101 (citation omitted).

State officials sued in their official capacities also share Eleventh Amendment immunity.

> The Eleventh Amendment bars a suit against state officials when the state is the 'real, substantial party in interest., Thus, '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.

Id. at 101-102 (citations omitted). The only exception to this rule is when a state official acts unconstitutionally. *Id.* at 102; *Ex parte Young,* 209 U.S. 123 (1908).

The doctrine of qualified immunity recognizes the need of government officials to be free from harassing lawsuits and apprehension of personal liability when they exercise authority and discretion while performing their jobs in the public interest. *Butz v. Economou,* 438 U.S. 478 (1987). In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court substantially limited the subjective component of the qualified immunity analysis in favor of an objective standard.

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive

> disruption of government and permit the resolution of many insubstantial claims on summary judgment.

Id. at 818 (citations and footnote omitted).

In *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), the United States Court of Appeals for the Sixth Circuit elaborated on *Harlow* and addressed the issue of whether inquiry into an official's motive or intent is necessary when conducting a qualified immunity analysis.

> 'Because the [*Harlow*] Court did not . . . purge substantive constitutional doctrine of all subjective issues, it did not entirely eliminate subjective inquiry from every qualified immunity analysis: some right . . . might be violated by actions undertaken for an impermissible purpose but not by the same actions undertaken for permissible purposes.' Thus, 'in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider that actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights.'

Poe, at 432 (citations omitted).

Plaintiff's equal protection claim is based upon allegations of selective enforcement of Plaintiff's permit provisions. However, selective enforcement of the law is not, in itself, a constitutional violation. *Oyler v. Boles*, 368 U.S. 448 (1962). In *United States v. Hazel*, 696 F.2d 473 (6th Cir. 1982) the Sixth Circuit quoted from *Boles* as follows:

> '[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in

> this case may imply a policy of selective enforcement, it was not stated that the selection was based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.' 368 U.S. at 456.
>
> Accordingly, it has been held that a defendant asserting selective prosecution: ' . . . bears the heavy burden of establishing, at least *prima facie,* (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, *and* (2) that the government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights.' *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir. 1974) (emphasis added).

696 F.2d at 474.

In *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332 (6th Cir. 1990), the Sixth Circuit addressed an equal protection claim brought pursuant to 42 U.S.C. § 1983. " 'To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.' " *Id.* at 341 (quoting *Johnson v. Morel,* 876 F.2d 477, 479 (5th Cir. 1989) (en banc).

V. Analysis

Plaintiff conceded that defendants MDNR and MMHC have immunity from suit in federal court for money damages and declaratory or injunctive relief pursuant to the Eleventh Amendment. Plaintiff's resp. br. at 3. Accordingly, they are entitled to dismissal pursuant to Rule 12(b)(1).

Defendant Harmes, director of MDNR, also has Eleventh Amendment immunity from suit in federal court for money damages and declaratory or injunctive relief. Although an exception to such immunity exists for state officials who have acted unconstitutionally, this exception does not apply to Harmes because the complaint failed to allege any unconstitutional acts by Harmes. Rather, the complaint merely identified him as director of MDNR. Furthermore, the prayer for relief contained no request for injunctive relief against Harmes; rather, the requested relief was against the Department. Accordingly, defendant Harmes is entitled to dismissal pursuant to Rule 12(b)(1).

Plaintiff conceded that MDPH has Eleventh Amendment immunity from suit in federal court for money damages and declaratory or injunctive relief. Plaintiff's resp. br. at 1. Plaintiff further indicated that he seeks no damages against defendant Davis. *Id.* Accordingly, defendants MDPH and Davis are entitled to dismissal pursuant to Rule 12(b)(l).

Thus, all that remains of Plaintiff's complaint are Counts III and IV as they pertain to defendant Jon Caterino. Count III alleged that defendant Caterino deprived Plaintiff of equal protection under the law

through selective enforcement of administration of the law with regard to waste water treatment and disposal facilities at the two mobile home parks and through purposeful discrimination. Count IV alleged a violation of 42 U.S.C. § 1983, presumably on the same basis.

The court finds that defendant Caterino is entitled to qualified immunity on these counts. As a government official performing discretionary functions, defendant Caterino is shielded from liability if his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1987). Assuming Plaintiff's allegations are true, defendant Caterino was acting pursuant to valid state law by enforcing the provisions of a valid permit with which Plaintiff had not complied. Therefore, his action was objectively reasonable.

Selective enforcement violates the equal protection clause only if such enforcement is based on a suspect classification or has no rational relationship to a legitimate state purpose. *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1982). In the instant action Plaintiff failed to allege that he is a member of a protected class. In addition, enforcement of policies and regulations regarding wastewater treatment systems has a rational relationship to a legitimate state purpose. Thus, defendant Caterino is entitled to dismissal on Plaintiff's equal protection and section 1983 claims. *Henry v. Metropolitan Sewer Dist.*, 922 332, 341 (6th Cir. 1990).

VI. Conclusion

It is hereby **ORDERED** that Defendants' motions to dismiss are **GRANTED**.

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: May 27, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Plaintiff,

V. CASE NO. 93-71013
HON. NANCY G. EDMUNDS

SUMPTER TOWNSHIP; HELEN TEALL, BARBARA DUDEK, ARNESS COX and LOUIS BANOTAI, Sumpter Township Trustees; MARVIN BANOTAI, Township Supervisor; PAUL JOHNSON, Deputy Supervisor and Township Administrator; JOAN ODDY, Township Clerk; JOHN MORGAN. Township Treasurer; MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMES, Director; MICHIGAN DEPARTMENT OF PUBLIC HEALTH, VERNICE DAVIS ANTHONY, Director; JOHN CATERINO and MICHIGAN MOBILE HOME COMMISSION,

Defendants.

_____/

ORDER OF DISMISSAL

The Court having granted the state defendants motions to dismiss and having been advised by plaintiff counsel, Robert A. Fineman, that the above entitled action has been resolved with regard to the claims against the township defendants,

IT IS THEREFORE ORDERED that the above-entitled action is DISMISSED WITH PREJUDICE AND WITHOUT COSTS.

/s/ NANCY G. EDMUNDS
NANCY G. EDMUNDS
United States District Judge

Dated: May 27, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHELDON M. FUTERNICK, d/b/a HOLIDAY WEST MOBILE HOME PARK and d/b/a HOLIDAY WOODS MOBILE HOME PARK,

Plaintiff, Case No. 93-71013

v. Hon. Nancy G. Edmunds

SUMPTER TOWNSHIP; HELEN TEALL, BARBARA DUDEK, ARNESS COX and LOUIS BANOTAI, Sumpter Township Trustees; MARVIN BANOTAI, Township Supervisor; PAUL JOHNSON, Deputy Supervisor and Township Administrator; JOAN ODDY, Township Clerk; JOHN MORGAN, Township Treasurer; MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ROLAND HARMES, Director; MICHIGAN DEPARTMENT OF PUBLIC HEALTH, VERNICE DAVIS ANTHONY, Director; JOHN CATERINO and MICHIGAN MOBILE HOME COMMISSION,

Defendants.

_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND AMENDING MAY 27, 1994 ORDER

This matter came before the court on Plaintiff's June 7, 1994 motion for reconsideration of the court's May 27, 1994 order, which dismissed the Township defendants with prejudice. Defendants filed a response June 27, 1994; and Plaintiff filed a supplemental brief July 7, 1994. The

court, having read the pleading and being fully advised in the premises, hereby **ORDERS** that Plaintiff's motion for reconsideration is **GRANTED**. It is further **ORDERED** that the court's May 27,1994 order is hereby **AMENDED** to order dismissal of the Township defendants without prejudice.

July 12, 1994
Date

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

No. 94-1902

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELDON FUTERNICK, d/b/a HOLIDAY WOODS MOBILE HOME PARK and d/b/a HOLIDAY WEST MOBILE HOME PARK,	)	ORDER
Plaintiff-Appellant,	)	(Filed Apr. 25, 1996)
v.	)	
SUMPTER TOWNSHIP, ET AL.,	)	
Defendants-Appellees.	)	

BEFORE: MERRITT, Chief Judge; CONTIE, and BOGGS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk, pe